BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
NORMANDY INVESTMENTS LIMITED)

Appearances:

For Appellant: Barry S. Rubin
Attorney at Law

Milton I. Berman
Certified Public Accountant

For Respondent: James W. Hamilton
Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Boa&denying the claim of Normandy Investments Limited for refund of penalty payments in the total amount of $2,505.68 for the year 1965.

Appellant Normandy Investments Limited is an English corporation engaged in the business of providing loan-out services of its motion picture artist employees. Appellant files its corporation income tax returns on a calendar year basis and consequently a return for a given year is due on March 15 of the following year unless an extension is granted.

During 1964 respondent, pursuant to section 26131 of the Revenue and Taxation Code, instructed certain of appellant's customers to withhold tax at the rate of 5.5% on any amounts paid to appellant for artists' services performed in California. On October 26, 1964, respondent wrote to appellant advising it to complete and to file an enclosed corporation income tax return for 1963. The letter

also contained information concerning delinquent filing penalties and arbitrary assessments. Appellant subsequently informed respondent that the corporation had no taxable income for 1963.

In February of 1965 respondent sent appellant a tax return form for 1964. On March 10, 1965, appellant requested an extension of time for filing, stating that it could not meet the March 15 due date. An extension was granted and the return was timely filed on April 9, 1965. The return indicated that amounts withheld exceeded tax liability. Respondent subsequently granted appellant's refund for 1964.

In September of 1965 respondent wrote to appellant requesting that a "California Corporation Declaration of Estimated Tax" form be filed for 1965, pursuant to section 25441 of the Revenue and Taxation Code. Appellant's response indicated that clarification was necessary and this was sent by respondent in November of the same year. The declaration of estimated tax was received by respondent on March 16, 1966.

On September 20, 1966, respondent, not having received a corporation income tax return from appellant for 1965, sent the appropriate return form to appellant. An accompanying letter, identical to the above described October 26, 1964, letter, was also sent. Appellant states that prior to this communication it had not received any return forms from respondent for 1965. At the hearing of this matter respondent testified that an addressograph plate for correspondence purposes had been set up for appellant. Therefore under normal Franchise Tax Board procedure appellant would have received a 1965 return form before the due date.

Appellant's 1965 return was filed on November 21, 1966. It showed that appellant's only income from California sources resulted from the services of actor Cnristopher Plummer, 'which ended on May 26, 1965. Amounts withheld exceeded tax liability. As part of its refund claim appellant requested that the refund amount first be applied to the California personal income tax liability of Mr. Plummer, whose 1965 return, due April 15, 1965, was filed along with appellant's. Respondent granted a refund to appellant for 1965 to the extent that taxes withheld exceeded appellant's and Mr. Plummer's tax liabilities and 25% late filing penalties assessed under sections 18681 and 25931 of the Revenue and Taxation Code. The only issues of this case are: (1) whether the penalties were properly assessed, and (2) whether they were properly computed.

Section 25931 provides for a graduated penalty, with a maximum of 25%, for the late filing of corporate tax returns. The taxpayer can avoid this penalty if it can show that the delay was due to reasonable cause and not due to wilful neglect. Section 18681 states an almost identical provision for the personal income tax. The above statutes are substantially the same as section 6651(a) of the federal Internal Revenue Code. The taxpayer has the burden of establishing reasonable cause, which is ascertained by the standard of ordinary business care and prudence. (Sanders v. Commissioner, 225 F.2d 629; Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.)

Appellant first contends that the inherent nature of its business created information-gathering problems which prevented the filing of a timely return. Appellant states that agents and employees must supply income and expense information and considerable time lags are involved in this process. However appellant does not explain its inability to avoid these time lags. Appellant must demonstrate the impossibility of obtaining the necessary information. (Nirosta Corp., 8 T.C. 987; Appeal of William T. and Joy P. Orr, Cal. St. Bd. of Equal., Feb. 5, 1968.) Furthermore, appellant's only California source of income for 1965 was the activity of Mr. Plummer, which ended on May 26, 1965. Therefore, appellant had over 9 months in which to gather the information it needed.

Appellant next argues that it is an English corporation, unfamiliar with California law, and consequently totally dependent upon the Franchise Tax Board's guidance. Appellant states that it relied upon the board to supply a return form prior to the due date, as the board had done in the previous year. Appellant contends that the board's failure to do this, combined with ambiguous and misleading language in its communications, estop the board from assessing the penalties in question.

The doctrine of equitable estoppel is not to be lightly invoked against the exercise of the sovereign power of the state to levy and collect taxes; the case must be clear and the injustice great. (California State Board of Equal. v. Coast Radio Products, 228 F.2d 520; U. S. Fid. & Guar. Co. v. State Bd. of Equal., 47 Cal. 2d 384 [303 P.2d 1034].) The instant situation does not present such a case..

We have carefully examined respondent's communications to appellant and do not find them to be ambiguous or misleading. Respondent's alleged failure to supply a timely

return form is of little consequence. Appellant's obligation to file a return arises from the receipt of income, and is not dependent upon receiving notice from respondent: (Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958.) Also respondent had supplied a timely return form for only one prior year, and this can hardly be argued to have been a pattern of conduct upon which appellant could justifiably rely. Furthermore prior communications between respondent and appellant, and the 1964 filing procedure of appellant, demonstrate that it was or should have been aware of its tax responsibilities, the March 15 due date, and the extension and penalty provisions. Finally, the doctrine of estoppel is not available to a party who has suffered loss because of his own failure to use due care. (Hampton v. Paramount Pictures Corp., 279 F.2d 100.) When appellant did not receive a timely return form, due care would at least demand the sending of an inquiry to the Franchise Tax Board.

Appellant also contends that the penalties in question are being assessed only because of the failure of appellant to comply with the "mere formality" of requesting an extension of time in which to file. However appellant overlooks the fact that extensions are granted only by the Franchise Tax Board "whenever in its judgment good cause exists." (Rev. & Tax. Code, § 25402.) They are not granted automatically.

We must conclude that appellant has not demonstrated that reasonable cause or estoppel prevented respondent from properly assessing penalties for the late filing of appellant's and Mr. Plummer's 1965 returns.

The second issue of this case is concerned with the propriety of respondent's application of the 25% penalty rate to the total tax liabilities shown on the returns. Appellant contends that the penalty rate should be applied only to the tax liabilities remaining unpaid at the due dates of the returns. The relevant portion of section 25931 states:

> ... 5 percent of the tax shall be added to the tax for each 30 days or fraction thereof elapsing between the due date of the return and the date on which filed, but the total addition shall not exceed 25 percent of the tax.

Section 25931.3 of the Revenue and Taxation Code, effective for years ending after December 31, 1966, (Stats. 1967,

p. 2529), and therefore not applicable to the instant case, enacted the method contended here by appellant.

West Virginia Steel Corp., 34 T.C. 851, involved a situation similar to the present one. The year in controversy was prior to the effective date of the already enacted federal counterpart of section 25931.3. The Tax Court stated that the case was controlled by the language of the federal counterpart of section 25931, which plainly directed that the penalty rate be applied to the total tax liability. We followed this case in Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.

Appellant's primary argument is that the Legislature never intended that the penalty rates be applied to amounts of tax that had already been paid. However, appellant bases this contention upon the erroneous premise that the corporation income tax withholding provision was first enacted after 1949, the latest enactment date of the penalty provision contained in section 25931.

Appellant also contends that subsection (3) of section 25401b of the Revenue and Taxation Code supports its position. However the introductory phrase of this subsection defines its scope by stating "For purposes of Section 26073," which is the code provision concerned with the statute of limitations on credits or refunds.

We conclude that respondent computed the amounts of the penalties correctly when it applied the penalty rates to the total tax liabilities of appellant and Mr. Plummer.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Normandy Investments Limited

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board denying the claim of Normandy Investments Limited for refund of penalty payments in the total amount of $2,505.68 for the year 1965, be and the same is hereby sustained.

Done at Sacramento, California, this 12th day of September, 1968, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary